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IN THE

Supreme Court of the United States

No. 320

UNITED STATES OF AMERICA,
Respondent,

v.

EDWARD EARL MASSENGILL,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The defendant, Edward Earl Massengill, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

In the December, 1963 Term at Alexandria, Virginia, a Federal Grand Jury returned an indictment against the Petitioner, Edward Earl Massengill, hereinafter referred to as Massengill, and five other persons, to-wit: William A. McClenny, Buster Everett Jarvis, Jr., Bonnie M. Minton, Holton Costen Rountree and Fletcher W. Reeves. This indictment charged the petitioner, along with four other persons, who were named as co-conspirators but not defendants, with conspiring under Title 18, Section 371, to violate the In-

ternal Revenue laws relating to illicit liquor U.S.C. Section 5008 (b), 5174, 5216, 5601, 5608, 5642, 5686, 7206(4) and 7302 (1954 Edition); 26 U.S.C. Section 5179, 5205(a) (2), 5222, 5601, 5601(a) (12), 5604, 5604(a) (1) and 5686 (1959 Editions); 18 U.S.C. Section 1952. The laws which the petitioner is alleged to have conspired to violate were the Internal Revenue laws relating to distilling; removing and concealing untax-paid distilled spirits; making and causing to be fermented, mash; having in his possession property intended for use in violating the Internal Revenue laws; possessing distilled spirits which did not have affixed to the containers thereof, certain stamps; and to travel in interstate commerce with intent to promote, manage, establish and carry on an unlawful activity, to-wit: a business enterprise involving liquor upon which the tax imposed by the United States had not been paid. The petitioner, prior to trial, moved for severance, which motion was denied, with the exception that Holtman Costen Rountree was granted a severance from the other named defendants. On May 20, 1964, the trial of the petitioner and the other defendants was commenced before a jury in Norfolk, the Honorable Walter E. Hoffman presiding. At the end of the Government's evidence, the defendant, Bonnie M. Minton was granted a judgment of acquittal and the jury convicted the petitioner, Massengill, and the defendants McClenny, Jarvis and Reeves. The petitioner, Massengill, was sentenced to five months' imprisonment and was fined Three Thousand Dollars, and the petitioner, Massengill, and the defendant McClenny thereafter filed a notice of appeal. The United States Court of Appeals for the Fourth Circuit affirmed the judgment of the United States District Court for the Eastern District of Virginia, at Norfolk, May 5, 1965.

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was entered on May 5, 1965. The statutory basis for attempting to invoke the jurisdiction of this court is Title 28, Section 1254, United States Code.

QUESTIONS PRESENTED

The questions presented are:

1. Whether or not the decision of the United States Court of Appeals upholding the decision of the District Court deprived the petitioner of his constitutional rights, and;

2. Whether or not the evidence was sufficient to create a jury issue as to the existance of the conspiracy charged in the indictment and whether or not the evidence disclosed a series of separate substantive crimes or separate conspiracies and whether or not the defendant was prejudiced by the grouping together of separate substantive offenses and separate conspiracies in one indictment.

REASONS FOR GRANTING THE WRIT

The evidence upon which the petitioner was convicted in the United States District Court and the evidence upon which the Court of Appeals for the Fourth Circuit based its decision to uphold the lower court, was as follows:

1. During the month of January of 1962, as alleged in Overt Act II, the defendant, Reeves, purchased from a druggist, a certain quantity of one-gallon used Coca-Cola jugs. Another person known as LeRoy Burke, who was not a defendant or an alleged co-conspirator assisted the defendant, Reeves, in the purchase and loading of these jugs. The jugs were loaded upon a U-Drive-It trailer, transported by Reeves and Burke to McClenny's garage, McClenny ap-

parently was present in the garage at the time the jugs were brought there by the defendant, Reeves, and LeRoy Burke. These jugs were then driven away from McClenny's garage in the U-Drive-It trailer to a point on a highway leading to North Carolina. There was no evidence that McClenny participated in the purchase or transportation of these jugs other than Reeves working for McClenny in the garage and the jugs having been transported into and out of the garage. Reeves, in explanation in a statement to the agents, said that he purchased the jugs and resold them at a profit to a man from North Carolina who leased the U-Drive-It vehicle and took possession of the jugs on the outskirts of Suffolk, Virginia. At this point in the evidence, none of the other defendants or co-conspirators were mentioned. Reeves does not appear again in the evidence until some ten months later. LeRoy Burke does not appear again in the evidence.

2. Some three months later, on March 2, 1962, a 1956 Ford automobile, driven by an unknown person, was found to contain 23 gallons of illegal whiskey after it had been wrecked on the streets of Suffolk. This vehicle was registered to McClenny Motor Company at the address of the defendant's garage. Found therein was a cap similar to one worn by the defendant, Reeves, on some prior occasion. The whiskey in the car was contained in five-gallon jugs and one-gallon jugs. At this point in the evidence, none of the other defendants were mentioned.

3. Some three months later, on June 6, 1962, Bonnie M. Minton and Buster Everett Jarvis, Jr., were arrested and charged with possessing sixteen and one-half gallons of illegal whiskey. This whiskey was found stored at the premises of Mr. Minton. Mr. Minton and Mr. Jarvis were charged with the possession of this whiskey and were acquitted by a jury in a State court. The evidence failed to

connect any of the other defendants or co-conspirators to this whiskey. Bonnie M. Minton does not appear in the evidence at any other time.

4. In August of 1962, the government informant, Billy Ray Mason, began transporting whiskey to Virginia on behalf of and as an employee of Massengill. It was at this point that Massengill is first mentioned. The indictment charges that the conspiracy had its inception in November of 1961, some ten months prior to Massengill's being mentioned in the evidence. Mason transported whiskey for Massengill to some unknown individuals in Newport News, Virginia, from August 9, 1962, to the latter part of October of 1962. None of the defendants, excepting Massengill, had any knowledge of or any connection with the operation of these distilleries in North Carolina. In fact the operation of the distilleries ceased prior to Massengill's having any connection with any of the other defendants. In the latter part of October, 1962, Billy Ray Mason, began transporting whiskey for Massengill and delivering the same to McClenny. The defendant, Buster Everett Jarvis, Jr., and the defendant, Fletcher W. Reeves, apparently assisted on at least one occasion in unloading some of the whiskey brought by Mason to McClenny.

The whiskey delivered by Mason was all contained in one-half gallon fruit jars. The last trip made by Mason to deliver whiskey to McClenny was on January 6, 1963. Massengill and Mason do not thereafter appear in the evidence.

5. On January 8, 1963, Buster Everett Jarvis, Jr., and Holtman Costen Rountree, possessed at a farm house 960 gallons of whiskey contained in plastic jugs. None of the defendants other than Jarvis and Rountree were shown by the evidence to be connected with this whiskey, with the possible

exception that an automobile which had been left at McClenny's Garage, was found near the farm house. This automobile was either loaned to Jarvis by McClenny or was taken by Jarvis by mistake while his automobile was being repaired at McClenny's garage. Jarvis professed to be, in a statement to agents, the owner of this whiskey. Rountree does not appear at any other place in the evidence.

6. On January 8, 1963, two individuals named Barry M. Jones and Vernon L. Jones, who were named as co-conspirators but not defendants, were charged with possessing 144½ gallons of whiskey which was stored in a truck near the home of the Jones' boys. This truck had been purchased by an individual named John C. Wise from a Mr. Lunkford on September 24, 1962. Mr. Wise traded a 1953 automobile in purchase of the truck and the title to the 1953 automobile was notarized by McClenny. The 1953 automobile was shown to contain a work order showing work having been done on the vehicle at McClenny's garage. The Jones' boys were charged with possession of the whiskey found in the truck. The Jones' boys do not appear at any other place in the evidence.

7. On February 6, 1963, the evidence disclosed that agents found 532 gallons of whiskey contained in plastic jugs in a shed which had been rented by a person using the name of Gene Revis. The defendant, Jarvis, used the name of Gene Revis on other occasions. This was the only connection shown by the evidence between this whiskey and any of the defendants in the case.

The Court of Appeals felt that the main plot was quick and alive in August or October, 1962. Your petitioner was shown to have participated in the events set forth in Paragraph 4. He, however, was required to attempt to meet the evidence introduced by the government as set forth in the

other six paragraphs. This evidence concerned large quantities of illegal distilled spirits over which your petitioner was not shown to have any dominion or control or to have been concerned with in any manner. The Court of Appeals recognized the difficulty faced by your petitioner, as well as other defendants indicted in a conspiracy trial. The Court of Appeals stated:

> "The trial of a conspiracy charge doubtless imposes a heavy burden on the prosecution, but is an especially difficult situation for the defendant. . . .
>
> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other. There are many practical difficulties in defending against a charge of conspiracy. . . ."

The government, by choosing to indict your petitioner under a charge of conspiracy, and by being allowed to show in that trial numerous acts committed by other persons, both before and after the conspiracy was "quick and alive," placed upon your petitioner a burden which was impossible to carry. Your petitioner was faced with evidence of the possession of many hundred gallons of whiskey over which he had no control and no knowledge of such possession. The names of numerous defendants and co-conspirators, who were not shown to have been connected with your petitioner in any way shape or form, were brought into the evidence. These persons were shown to have done many acts of an illegal nature concerning violations of the Internal Revenue Laws relating to liquor; which evidence was allowed to be

placed before the jury for their consideration and which evidence undoubtedly contributed largely to the conviction of your petitioner.

In no other type of criminal case, does the defendant find himself faced with the necessity of repelling evidence of acts of a criminal nature done by persons not connected with him and over which acts he has no control. The requirement that a defendant should have to meet such evidence is repugnant to the basic idea of due process, and is not in keeping with the theory of the crime of conspiracy. This court has recognized in *Kotteakos* v. *United States,* 328 U.S. 750, and in *Krulewitch* v. *United States,* 336 U.S. 440, that conspiracy charges which require a defendant to be tried "en masse" with other persons and/or acts over which he has no control, is to be condemned.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted in order to protect the petitioner's individual rights.

Respectfully submitted,

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Of Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9603

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM A. McCLENNY AND
EDWARD EARL MASSENGILL,

Appellants.

Appeals From the United States District Court for the Eastern District of Virginia, at Norfolk.
Walter E. Hoffman, Chief Judge.

(Argued March 1, 1965. Decided May 5, 1965.)

Before HAYNSWORTH, Chief Judge, and BRYAN and BELL, Circuit Judges.

R. R. Ryder (Court-assigned counsel) for Appellant William A. McClenny, and for Appellant Edward Earl Massengill, and Plato Cacheris, First Assistant United States Attorney, (C. V. Spratley, Jr., United States Attorney, on brief) for Appellee.

PER CURIAM:

Convicted with others in the District Court of conspiring to violate the Internal Revenue laws* relating to illicit whiskey, from November 1961 to December 1963 at or near Suffolk, Virginia, William A. McClenny and Edward Earl Massengill appeal. They assert that the evidence did not establish the indictment-conspiracy but, even if it did, they were prejudiced by the proof of other unrelated criminal complots. Kotteakos v. United States, 328 U. S. 750 (1946). We affirm the convictions.

Undoubtedly, McClenny and Massengill with co-defendants Fletcher Reeves and Buster Jarvis feloniously confederated in October, and probably as early as August, 1962. Testimony, however, was introduced by the Government as to suspected joint complicity of only McClenny and Reeves in whiskey offenses in January and March 1962, for which there had been no prosecution. Massengill now asserts that this alliance and conduct of McClenny and Reeves were not proved to be known by him previous to his alleged contrivance with them and constituted a conspiracy which was not included in the indictment. Consequently, he stresses, these incidents were not imputable to him and the proof of them was seriously damaging.

However, we are not required to resolve this issue, for in our judgment the admission of this evidence, if error, was innocuous. Massengill's subsequent participation in a conspiracy with the others accused—at least from October 1962 and thereafter—is so overwhelmingly established by other evidence that proof of the events in January and

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* 26 USC §§ 5008(b), 5174, 5216, 5601, 5608, 5642, 5686, 7206(4) and 7302, (1954 Edition); 26 USC §§ 5179, 5205(a)(2), 5222, 5601, 5601(a)(12), 5604, 5604(a)(1) and 5686, (1959 Edition). 18 USC § 1952.

March 1962, touching McClenny and Reeves solely, could have contributed only negligibly to the conviction of Massengill.

Plainly, McClenny was not aggrieved by proof of the January-March 1962 happenings. They were clearly antecedent to the main plot which was quick and alive in August or October 1962; they were "integral steps" towards the indicted conspiracy. Blumenthal v. United States, 332 U. S. 539, 559 (1947).

The problems presented in this case suggest the question of why the Government proceeded on the basis of a conspiracy. Substantive offenses could as readily have been laid against the cabal, all and singular, and resort to the conspiracy charge is not explained as required or advisable. Repeatedly the courts have deplored the difficulties placed by this form of accusation upon both court and defendants. The trial judge is extraordinarily burdened to maintain the differing privileges of the several accused, and upon each of them is imposed the added anxiety of protecting himself against the effect of evidence going before the jury but at the time said to affect him only conditionally. Justice Jackson inveighed against the practice in Krulewitch v. United States, 336 U. S. 440, 453 (1948):

> "The trial of a conspiracy charge doubtless imposes a heavy burden on the prosecution, but is an especially difficult situation for the defendant. . . .
>
> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other,

> they convict each other. There are many practical difficulties in defending against a charge of conspiracy. . . ."

See, too, the condemnation of trials "en masse" in Kotteakos v. United States, supra, 328 U. S. 750, 773 (1946).

However, as we find no trial errors instantly, the judgments upon the appellants must stand.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 320

EDWARD EARL MASSENGILL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 242 Misc.

WILLIAM A. MCCLENNY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1965. The petition for a writ of certiorari in No. 242 Misc. was filed on June 2, 1965. By order of the Chief Justice, the time for filing a petition for a writ of certiorari in No. 320 was extended to and

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including July 4, 1965. The petition for a writ of certiorari in No. 320 was filed on July 3, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence showed a single conspiracy.
2. Whether the testimony of a co-conspirator should have been excluded (raised in No. 242 Misc.).

STATEMENT

Petitioners and four codefendants were indicted in the United States District Court for the Eastern District of Virginia for conspiracy to violate various federal laws relating to illicit liquor (R. 2–9).[1] Before trial, a severance was granted to codefendant Rountree (Tr. 11). At the conclusion of the evidence, the trial court directed the acquittal of codefendant Bonnie Minton (Tr. 452). The jury convicted the remaining defendants (Tr. 515). Petitioners were each sentenced to imprisonment for a period of five months and to pay a fine of $3,000 (1 R. 36–27). The court of appeals affirmed.

The evidence showed that in August 1962, government witness Billy Ray Mason began to make deliveries of non-taxpaid whiskey for petitioner Massengill (Tr. 225–227). In October 1962, Massengill told Mason that petitioner McClenny had called him several times asking for whiskey (Tr. 229). Mason thereafter delivered whiskey for Massengill to McClenny Motors at Suffolk, Virginia, making twelve to fifteen such trips and receiving six to seven hundred

[1] "R" and "Tr." refer to the record and transcript in No. 242 Misc.

dollars, which he would turn over to Massengill, for each load of approximately twenty cases (Tr. 234–235, 241). McClenny told Mason that he was also getting whiskey from other sources (Tr. 242). Co-conspirator Rufus Massengill assisted in making deliveries to McClenny (Tr. 242), and codefendant Jarvis helped unload on one occasion (Tr. 234, 236). On the last trip which Mason made, in January 1963, he had tire trouble, and petitioner McClenny came to his assistance (Tr. 237–241).

On January 8, 1963, Mason helped to load the car of Rufus Massengill with whiskey (Tr. 243). Rufus Massengill was arrested on that day and $700 was found in his possession (Tr. 352–353). On the same day, January 8, 1963, a Ford truck with the words "Plumbing and Heating" painted on the side was seized with 144 one-half gallons of non-taxpaid whiskey in glass jars (Tr. 195–198). A similar truck had been inspected in the hands of a dealer by codefendant Jarvis in September 1962, and a few days thereafter a man identifying himself as John C. Wise of Suffolk, Virginia (the name in which the truck was registered), had obtained it in exchange for another car. The dealer had called McClenny Motors and talked with someone who identified himself as petitioner McClenny before he closed the deal because Wise's title certificate had been notarized by McClenny (Tr. 80–89). The telephone company records showed a call from McClenny Motors to the Division of Motor Vehicles in November 1962 (Tr. 35–38), and a clerk of the division remembered receiving a telephone call in November from a John C. Wise, requesting that

the title (which had previously been returned undelivered) be mailed to him at Route 1, Suffolk (Tr. 97–102).

On February 6, 1963, more than five hundred gallons of non-taxpaid whiskey were seized on a farm rented under the name of Gene Revis (Tr. 198–201, 219–220). Jarvis admitting using that name in renting another farm on which 960 gallons of whiskey were seized on February 20, 1963 (Tr. 360, 373–374, 380–381). Jarvis and severed defendant Rountree were at the time loading whiskey into a Chevrolet which had been left for repairs at McClenny Motors by a Mrs. Johnson. In October 1962, codefendant Reeves had told Mrs. Johnson the car needed more repairs. In January 1963, Jarvis had been seen backing it out of the McClenny garage, in the presence of McClenny (Tr. 161–163, 359–360, 385–389).

There was also testimony concerning three events which occurred before petitioner Massengill was shown to have participated in the conspiracy: (a) In January 1962, Reeves purchased approximately two hundred one-gallon Coca Cola jugs and loaded them on to a U-Haul-It trailer registered to McClenny Motors. He then drove to McClenny Motors, unloaded some of the jugs and drove off on a highway leading to North Carolina. McClenny, questioned about this by police, said that Reeves was hauling the jugs for somebody in North Carolina (Tr. 125, 129–133). (b) On the early morning of March 2, 1962, a red-and-cream 1956 Ford was seen on the streets of Suffolk with no front license plate. When an officer turned to pursue it, the Ford drove off but was found

shortly thereafter with a flat tire and its driver gone. It contained twenty-three gallons of non-taxpaid whiskey. Reeves had previously been seen driving this car, and the cap found in the seat was similar to one which Reeves had been seen wearing. The Ford was registered to McClenny Motors (Tr. 134–137, 154–155, 159). (c) On June 6, 1962, officers made a search pursuant to warrant of the farm of one Minton, Jarvis' stepfather, near Windsor, Virginia. Non-taxpaid whiskey was discovered in an outbuilding. Mrs. Minton told the officers that she would not let her husband have the whiskey inside the house, but there was no evidence implicating her in its possession (Tr. 177–182, 192). Minton, who had been acquitted on a State liquor charge involving this incident, was not charged in this case (Tr. 190). The trial court directed Mrs. Minton's acquittal and instructed the jury that she had been eliminated from the case (Tr. 452, 487).

ARGUMENT

1. When the fragments of evidence in this case are put together, they show a single conspiracy involving the distribution of illicit whiskey in the area around Suffolk, Virginia. At the center of this operation was petitioner McClenny, and he was assisted by codefendants Jarvis and Reeves. Joining the conspiracy some time after its inception, as a wholesale supplier from unlicensed distilleries in North Carolina, was petitioner Massengill. The fact that Massengill joined the conspiracy at a later date does not, of course, relieve him of responsibility for prior acts

of his co-conspirators. *Hernandez* v. *United States*, 300 F. 2d 114, 122 (C.A. 9); *United States* v. *Doran*, 299 F. 2d 511, 514 (C.A. 7), certiorari denied, 370 U.S. 925; *United States* v. *Dardi*, 330 F. 2d 316, 329 (C.A. 2). Nor does his entry into the illegal venture divide the single unlawful combination into two. Even if the evidence of prior acts by other conspirators was inadmissible against him, it was proper for the prosecution to put it into evidence against the other defendants with a limiting instruction to the jury. No such instruction was requested here.

The only evidence which was not connected to the conspiracy concerned the seizure of whiskey at the Minton farm. The jury was instructed that Mrs. Minton had been eliminated from the case. Inasmuch as no other defendant was mentioned in connection with this evidence, and no broader instruction was requested, no prejudice resulted from the admission of this evidence.

2. Mason testified on cross-examination that a sheriff came to see him several times on a bad-check charge, that some evenings they talked for several hours, and that thereafter the sheriff put him in touch with State liquor authorities (Tr. 315, 320–321). There is no merit to petitioner McClenny's argument that these facts required the exclusion of Mason's testimony. These were matters properly brought out on cross-examination as bearing on Mason's credibility, and their weight was for the jury. The jury was properly instructed regarding the factors to be considered in determining credibility and was told

to weigh the testimony of Mason with care since he was an accomplice (Tr. 506–508).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1965.

END